

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





# 77-1483

To be argued by  
STEVEN LLOYD BARRETT

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
:  
UNITED STATES OF AMERICA,  
:  
Plaintiff-Appellee,  
:  
-against-  
:  
NEREIDA HERNANDEZ,  
:  
Defendant-Appellant.  
:  
-----X

Docket No. 77-1483

B P/S

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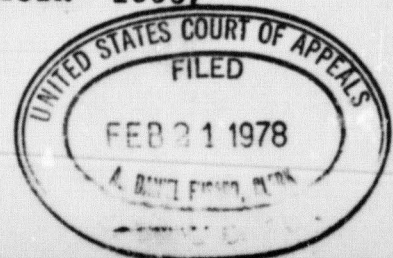
## APPENDIX TO APPELLANT'S BRIEF

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ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

MARTIN ERDMANN,  
THE LEGAL AID SOCIETY,  
Attorney for Appellant  
FEDERAL DEFENDER SERVICES UNIT  
509 United States Courthouse  
Foley Square  
New York, New York 10007  
(212) 732-2971

STEVEN LLOYD BARRETT,  
Of Counsel.



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000-1 0034

HERNANDEZ, NEREIDA

07 22 / 77 462 04

21:846

Cons. to viol. Fed. Narco. Laws.

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BAIL • RELEASE

KEY DATES & INTERVALS

|                                 |                                                                                                                                                                      |                                                           |                                                                                    |                                                                                                                                                                                                                                          |
|---------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------|------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| ARREST or<br>U.S. Custody Began | INDICTMENT <input checked="" type="checkbox"/><br>Information <input type="checkbox"/><br>7-22-77<br>Indict. Waived <input type="checkbox"/><br>In Charging District | ARRAIGNMENT<br>8-2-77<br>1st Plea<br>8-2-77<br>Final Plea | TRIAL<br>Trial Set For<br>8-2-77<br>Trial Began<br>8-2-77<br>Trial Ended<br>8-2-77 | SENTENCE<br>Disposition of Charges<br>8-2-77<br>11-14-77<br>Convicted <input checked="" type="checkbox"/><br>Acquitted <input type="checkbox"/><br>Dismissed <input type="checkbox"/><br>On Government's Motion <input type="checkbox"/> |
|---------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------|------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

|      |             |                       |             |         |
|------|-------------|-----------------------|-------------|---------|
| DATE | INITIAL NO. | INITIAL MADE AND DATE | INITIAL NO. | OUTCOME |
|      |             |                       |             |         |

ATTORNEYS Defense ☐ CJA ☐ Ret ☐ Waived ☐ Self ☐ None ☐ Other ☐

Richard Lawler  
191-1941

Dellafuente, et al.

| DATE     | (DOCUMENT NO.) | PROCEEDINGS                                                                                                                                    | EXCLUDED FROM REPORT |
|----------|----------------|------------------------------------------------------------------------------------------------------------------------------------------------|----------------------|
| 7-22-77  |                | Filed indictment. Referred to Judge Gagliardi. Haight, J.                                                                                      |                      |
| 07-27-77 |                | Deft. (atty. Roland Thau) no appearance by deft.'s atty. and defts. to appear before Magistrate on 8-1-77. Gagliardi, J.                       |                      |
| 08-04-77 |                | Filed documents forwarded by Magistrate Schreiber: 8-2-77 Deft. appeared with counsel, and entered plea of NOT GUILTY. Deft. released on bail. |                      |
| 08-17-77 |                | Filed govts requests for voir dire                                                                                                             |                      |
| 08-18-77 |                | Filed de s N tire o' Mo io to supress . ret 8/22/77                                                                                            |                      |
| 08-19-77 |                | Filed Deft's affdvt&notice of motion for an order granting deft an order of trial severance pursuant to Rule 14, FRCP.                         |                      |
| 08-22-77 |                | Hearing held on motion to supress & sever. Denied Gagliardi J 3 8-22 E 1                                                                       |                      |
| 08-24-77 |                | Jury Trail begun before Judge Gagliardi & cont'd.                                                                                              |                      |
| 08-27-77 |                | Trial cont'd                                                                                                                                   |                      |
| 08-30-77 |                | Trial cont'd                                                                                                                                   |                      |

A



11-17-77 Judgment awarded by Magistrate Sinclair.  
11-17-77 Deft. presented. Legal Aid assigned (Thau) deft.  
released on \$5,000. PRB with PSA supervision.  
11-17-77 Filed transcript of record of proceedings, dated 11-13-77.

11-14-77 Filed JUDGMENT (atty. Roland Thau) YOUNG ADULT OFFENDER 18:5010(a)  
4216 I.S.S. 3 yrs. prob. w/superCagliardi, J. issued all copies

11-21-77 Filed deft.'s notice of appeal from judgment of 11-11-77  
Mailed copies to U.S. Atty. & Atty.

A TRUE COPY  
RAYMOND E. BURCHARDT, Clerk

*[Signature]*  
Deputy Clerk

FINE AND RESTITUTION PAYMENTS

| DATE | DEBIT NUMBER | C.D. NUMBER | DATE | RECEIPT NUMBER | C.D. NUMBER |
|------|--------------|-------------|------|----------------|-------------|
|      |              |             |      |                |             |
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|      |              |             |      |                |             |

B





UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

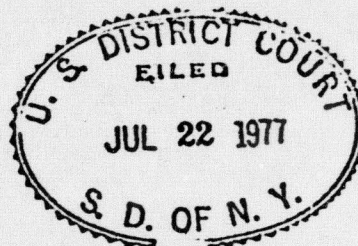
-v-

CARLOS DELLAFUENTE, RAFAEL PAGAN,  
EDEMIRO TORRES, NEREIDA HERNANDEZ,  
JUAN CRUZ, RADIMUS DEJESUS and  
CARLOS RODRIGUEZ,

Defendants.

INDICTMENT

S 77 Cr. 462



COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of April 1977 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, CARLOS DELLAFUENTE, RAFAEL PAGAN, EDEMIRO TORRES, NERIDA HERNANDEZ, JUAN CRUZ, RADIMUS DEJESUS and CARLOS RODRIGUEZ, the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances, to wit, heroin and cocaine, in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

(S) 77 Cr 462

MICROFILM

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1. On or about April 7, 1977 the defendants CARLOS RODRIGUEZ, RADIMUS DEJESUS, JUAN CRUZ and EDEMIRO TORRES were together at 640 East 139th Street, Apt. 3H, New York, New York.

2. On or about April 7, 1977 the defendants CARLOS RODRIGUEZ and JUAN CRUZ assisted EDEMIRO TORRES in counting \$1200.

3. On or about April 7, 1977 the defendant CARLOS RODRIGUEZ gave 2 tinfolils of cocaine to an individual.

4. On or about April 14, 1977 the defendants RADIMUS DEJESUS and EDEMIRO TORRES were together at 640 East 138th Street, Apt. 3H, Bronx, New York.

5. On or about May 24, 1977 the defendants EDEMIRO TORRES and NEREIDA HERNANDEZ were together at 640 East 138th Street, Apt. 3H, Bronx, New York.

6. On or about June 10, 1977 the defendant CARLOS DELLAFUENTE flew to New York, New York from Chicago, Illinois.

7. On or about June 10, 1977 the defendants CARLOS DELLAFUENTE, RAFAEL PAGAN and EDEMIRO TORRES met in the vicinity of 1246 Westchester Avenue, Bronx, New York.

(Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

On or about the 7th day of April, 1977, in the Southern District of New York, EDEMIRO TORRES, the defendant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately .09 grams (net weight) of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A)).



COUNT THREE

The Grand Jury further charges:

On or about the 7th day of April, 1977, in the Southern District of New York EDEMIRO TORRES, CARLOS RODRIGUEZ, JUAN CRUZ and RADIMUS DEJESUS, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 30.63 grams (net weight) of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), and Title 18, United States Code, Section 2.)

COUNT FOUR

The Grand Jury further charges:

On or about the 7th day of April, 1977, in the Southern District of New York, EDEMIRO TORRES and CARLOS RODRIGUEZ, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately .20 grams (net weight) of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), and Title 18, United States Code, Section 2.)

COUNT FIVE

The Grand Jury further charges:

On or about the 14th day of April, 1977, in the Southern District of New York EDEMIRO TORRES and RADIMUS DEJESUS, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 63.19 grams (net weight) of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), and Title 18, United States Code, Section 2.)







COUNT SIX

The Grand Jury further charges:

On or about the 24th day of May, 1977, in the Southern District of New York EDEMIRO TORRES, the defendant unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately .85 grams (net weight) of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT SEVEN

The Grand Jury further charges:

On or about the 1st day of June, 1977, in the Southern District of New York EDEMIRO TORRES, the defendant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 1.61 grams (net weight) of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT EIGHT

The Grand Jury further charges:

On or about the 1st day of June, 1977, in the Southern District of New York EDEMIRO TORRES, the defendant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 1.92 grams (net weight) of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)



COUNT NINE

The Grand Jury further charges:

On or about the 11th day of June, 1977, in the Southern District of New York, CARLOS DELLAFUENTE, RAFAEL PAGAN and EDEMIRO TORRES, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 1546.6 grams (net weight) of heroin.

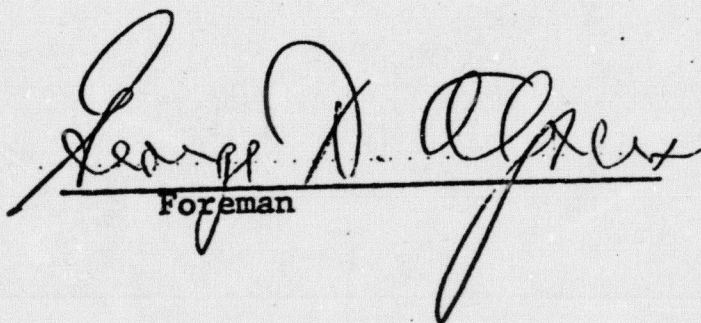
(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), and Title 18, United States Code, Section 2.)

COUNT TEN

The Grand Jury further charges:

On or about the 11th day of June 1977, in the Southern District of New York CARLOS DELLAFUENTE, the defendant, unlawfully, wilfully and knowingly did carry a firearm during the commission of a felony in that he did carry a .32 caliber Titan automatic pistol, Serial No. C18099 during such time as he did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, the felony charged in Count Nine.

(Title 18, United States Code, Section 924(c)(2).)

  
Foreman

  
ROBERT B. FISKE, JR.  
United States Attorney



10-26-77 - CARLOS DELLAFUENTE (Atty Robert Klesner)  
5 years imprisonment. S.P. 6 years. (to 9-2-10 dismissed)

EDEMIRO TORRES (Atty. Minerva Perlmuter)  
5 years on each of 26 329, concurrently. S.P. 6 years.  
to 1-2-4-5-6-7-8 dismissed.

Hayward, J.

W

11-11-77. NEREIDA HERNANDEZ (Atty Robert Thaw present)  
Inq. of Sub. Suspended, Prob 3 years. Special condition of  
Probation. - Wfr shall reside in, and participate in a  
residential community treatment center during the period  
of probation, until released by the Court or its  
Authorized representative, upon the determination  
of the Center's Director or on the discretion of the  
Court.

10-26-77  
D  
Surrender to the community treatment center is  
not to take place for 2 weeks, during which  
time an evaluation shall be made as to the  
necessity of the confinement in a residential  
center.

W



8/18/77. Deft. Edmundo Torres (in custody, and atty. Nereida Hernandez present). The deft. (thru interpreter) withdrew a Not Guilty plea, and pleaded

"Guilty" on Counts 3 and 9 of the Indictment.  
J Pre-Sent. Tr. Ordered. Date of sentence  
to be set by Judge Gayles.  
Deft. Remanded. Gaittel J. Hone

PART I  
8-19-77.

CARLOS RODRIGUEZ - (Atty Jerome Landau) Deft. with  
draws his previous plea of Not guilty and now pleads  
guilty to count 4 only. P.S.I. Ordered, sentence adj'd  
to SINE DIE (B) Owens, J.

AUG 22 1977

CARLOS DE LA FUENTE (Atty Robert Blum and interpreter Rosa S. Kohn)  
Deft. with. draws his plea of not guilty and now pleads guilty  
to count 1 only. P.S.I. Ordered, for sentence - Sept 21, 1977 @ 9:30.  
Deft. sent to. Remanded in lieu of bail fixed at \$25,000 C/S. B

RAFAEL PAGAN (Atty. David Siegel) Deft. with draws his  
plea of not guilty and now pleads guilty to count 9 only. P.S.I.  
Ordered, for sentence - Oct 18, 1977 @ 9:30. Deft. continued on  
present bail until date of sentence.

NEREIDA HERNANDEZ (Atty. Roland Thau) - hearing held on  
motion to suppress and to sever. - DENIED.

Gayles, J.





AUG 23 1977

RADIMUS DE JESUS (atly Alan Lippel & interpreter Rindness),

Def. with drawn plea of N.A. and now pleads guilty  
to ~~the~~ count 1 only, P.S.I. Ordered, for sentence Oct 18, 1977  
© 4<sup>th</sup>. Def. out on present bail until date of sentence B

Before Hogland, J. - jury trial begun as to defts -  
NEREIDA HERNANDEZ. B  
JUAN CRUZ. P

AUG 24 1977

- trial continued (Def. Lippel only - Def. on its 1 & 3. P.S.I.)  
Ordered for Oct 18-77 but 11 on present

AUG 25 1977

- trial continued - includes - jury returns

AUG 26 1977

- trial continued - includes - jury returns  
with a verdict. Ref. Hernandez on it 1 - Guilty.  
P.S.I. Ordered for sentence 10-18-77 © 9<sup>th</sup> Def.  
out on present bail until date of sentence.  
Hogland, J.

10-18-77 - RADIMUS DE JESUS (atly Alan Lippel & interpreter  
Richard Selken). 33 months imprisonment, S.P. 6 years.  
© 3 & 5 dismissed. B

JUAN CRUZ - (atly Ralph Naden). Def. did not appear.  
Bail revoked, B/W Ordered.  
Hogland, J.

10-20-77 - CARLOS RODRIGUEZ (atly James Allen Landon & interpreter  
Richard Selken) 24 months imprisonment. S.P. 6 years.  
© 1 & 3 dismissed.  
Hogland, J.

10-25-77 RAFAEL PAGAN (atly David Segal) 4 years  
imprisonment in it 9. S.P. 6 years. © 1 dismissed

Hogland, J.



5) 100-162

JUDGE GAGLIARDI

Filed Supreme Court  
Hight, J.

United States District Court  
SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

CARLOS DELLAFUENTE, RAFAEL PAGAN,  
DEMIR TORRES, NEREIDA HERNANDEZ,  
JUAN CRUZ, RADIMUS DEJESUS and  
CARLOS RODRIGUEZ;

Defendants.

### INDICTMENT

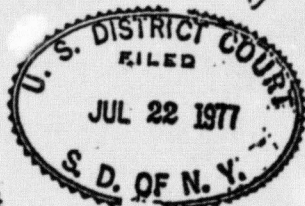
Title 21, U.S.C. 812, 841(a)(1),  
41(b)(1)(A), and 846; Title  
18, U.S.C. 924(c)(2).

ROBERT B. FISKE, JR.

United States Attorney.

TRUE BILL

George X. Alper  
Forem



JUL 27 1977

Carlos Dellafuente (att. Robert Blascow)  
Interprete Jose Mendez (att. Robert Blascow) left pleas not guilty. **REMANDED.**

Rafael Pagan (att. David Segal) left pleas  
not guilty. Left court on present bail.

Demir Torres (att. Hermana Perlmuter)  
left pleas not guilty. Left court on present bail. **REMANDED.**

left. Nereida Hernandez (att. Roland Shaw) } no appearance by  
Juan Cruz (att. Michael Mendelson) } Defs. Attys and  
Radimus De Jesus (att. Ralph Naden) } left to appear  
Carlos Rodriguez (att. Jerome Allen Larkin) } before Magistrate  
on 8-1-77 @ 10:30

Gagliardi, J.

8-1-77

Juan Cruz (att. R. Naden) pleads  
not guilty before Mag. Schreiber, bail  
continued.

Carlos Rodriguez (att. Shaw) pleads  
not guilty before Mag. Schreiber, bail  
continued.

Radimus De Jesus (att. Naden) pleads not  
guilty before Mag. Schreiber, bail cont.

8-2-77 Nereida Hernandez (att. Roland Shaw) enters pleas of  
not guilty before Mag. Schreiber. Bail continued.



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jkbj

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CHARGE OF THE COURT

( v. Dellafue8te  
h7 Cr 462  
8/25/77 4

(Gagliardi, J.)

4

THE COURT: There is one exception to the

5

fact that no one will be permitted to enter or leave, and

6

that is the marshal who has gone to place your order for

7

lunch, he's going to be able to enter. But the reason for

8

that announcement, as you can well understand, is the fact

9

that we don't want you to be distracted by somebody walking

10

in and out casually and so forth and detracting the

11

attention that I'm sure that you will give to me as I

12

instruct you on the law.

13

Now, you are about to enter upon your final

14

duty, which is to decide the fact issues in this case. As

15

I told you at the beginning of my instructions, at the

16

beginning of the trial, your principal function during the

17

taking of testimony would be to listen carefully and

18

observe each witness as that witness testified, and it has

19

been evident to me that you have faithfully discharged

20

this duty.

21

We have now reached the point in this case

22

where all of the evidence has been presented, and the

23

closing arguments of the lawyers have been made. Shortly

24

after I have completed my explanation of the applicable

25

law, you will retire to deliberate upon your verdict. You



jkbq

are to perform your final duty in an attitude of complete fairness and impartiality. You are to appraise the evidence calmly and deliberately, and as was emphasized by me at the time of your selection as jurors, without bias, prejudice, sympathy, with respect to either the Government or the defendants as parties to this controversy.

Now the fact that this prosecution is brought in the name of the United States of America entitles it to no greater consideration than that accorded to any other party in the case, and, by the same token, it is entitled to no less consideration. All parties stand as equals before the bar of justice. Your final role is to pass upon and decide the fact issues in this case. You, the members of the jury, are the sole and exclusive judges of the facts. You pass upon the weight of the evidence. You determine the credibility of the witnesses. You resolve such conflicts as there may be in the testimony, and you draw whatever reasonable inferences that are to be drawn from the facts as you determine the facts to be.

My function at this point is to instruct you on the law. It's your duty to accept these instructions of the law and apply them to the facts as you determine them. The logical result of that application will be your verdict in this case.



2 Now with respect to any fact matter, it is  
3 your recollection and yours alone that governs. Anything  
4 that counsel either for the Government or for the defense  
5 may have said with respect to any matters of evidence,  
6 that is to any factual matter, whether stated in a question,  
7 in argument, or in summation, is not to be substituted  
8 for your own independent recollection. And so, too, any-  
9 thing that the Court may have said during the course of  
10 the trial with respect to a fact matter or that I may say  
11 during the course of these instructions is not to be taken  
12 in substitution for your own independent recollection  
13 which governs at all times.

14 Now before we consider the precise charges  
15 in the indictment, I think a few preliminary observations  
16 may be of help to you.

17 In determining the facts, you should not be  
18 influenced by rulings that the Court may have made during  
19 the trial. These rulings dealt solely with questions of  
20 law and not questions of fact.

21 Counsel for both sides had not only the right  
22 but indeed the duty to press whatever legal objections  
23 they believed existed as to the admission of offered  
24 evidence. The Court's rulings on objections made by either  
25 the attorney for the Government or the defense attorneys



are not to be considered by you. Of course, as I told you at the outset, where I sustain an objection to a question, you must not speculate on what the witness would have said had he been permitted to answer, nor may you draw any inference from the mere fact that the question was asked or by reason of its wording.

And similarly, where any testimony has been stricken, it is not evidence, and you are bound to disregard it. However, you must remember that in ruling on objections, the Court is deciding questions of law, and not questions of fact which are for you alone.

Now, during the course of the trial it became necessary, as I saw it, to perhaps admonish counsel. Sometimes in the ardor of advocacy counsel say and do things that in calmer moments they would not have said or done. These incidents are to play no part in your deliberations.

On the other hand, it's my function as the Judge in this court to see that this trial be conducted with complete fairness and impartiality to both sides. And I recognize that a judge may have some influence with a jury. None of these incidents should play any part in your deliberations nor should you,--if you think you have gleaned some indication as to my opinion of the case, either from any questions I may have asked or from my



jkbq

expression or tone of voice, disregard it entirely. The Court has no opinion as to the veracity or credibility of the witnesses or the guilt or innocence of these defendants. You are the judges of the facts, and you are the sole judges of the guilt or innocence of these defendants. I'm merely a judge of the law. And the fact issues must be decided by you solely and only within the framework of the evidence and the principles of law that apply.

And finally, please don't single out any one of my instructions as stating the law alone. Take them all into consideration after you have heard them all.

Now, you are to consider only the evidence in the case which consists of the sworn testimony of the witnesses, the exhibits which have been received in evidence the facts which have been stipulated, and the presumptions which I will tell you about in these instructions, such as the presumption of innocence. But while you are to consider only the evidence in the case, you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw from the facts which you find have been proved such reasonable inferences as seem justified to you in the light of your own experience.

An inference is merely another word for a



1 jkby

2 conclusion which reason or common sense leads you to draw  
3 from the facts that have been proved here.

4 In considering the evidence, you must remember,  
5 as I told you at the beginning of this trial, that the  
6 indictment is only a formal method of accusing a defendant  
7 of the crime charged and itself is not evidence against a  
8 defendant, nor is any weight to be given to the fact that  
9 an indictment has been returned against the defendants.

10 Generally speaking, there are two types of  
11 evidence from which a jury may properly find the truth as  
12 to the facts of the case. One is direct evidence, such  
13 as the testimony of an eyewitness, that is, somebody who  
14 saw or heard something done or said. And the other is  
15 indirect or circumstantial evidence, which is the proof  
16 of a chain of circumstances pointing to the existence or non-  
17 existence of certain facts.

18 Generally the law makes no distinction between  
19 direct and circumstantial evidence, but simply requires  
20 that the jury find the facts in accordance with all the  
21 evidence in the case, both direct and circumstantial.

22 We have a rather common, simple example that  
23 a lot of us judges use to illustrate what is meant by  
24 direct and circumstantial evidence.

25 Now let's assume, as is the case, when you



1 jkbg

2 came in here this morning, and as you can see now, that  
3 this is a bright, beautiful, sunshiny day, there is not a  
4 cloud in the sky, no indication that it's going to be any  
5 different for the balance of the day. Now you can see  
6 and observe that. That is direct evidence.

7 Now let's assume the same facts, and let's  
8 assume that we are in one of those courtrooms down on the  
9 first floor, right off the entrance of the building. Now  
10 that courtroom down there or one of them down there doesn't  
11 have any windows in it, it's got air conditioning in it,  
12 which sometimes works or doesn't, but it doesn't have any-  
13 thing by which you can see outside.

14 Now let's assume that as you came in here this  
15 morning, a day such as I've described, and let's assume  
16 that we were in that courtroom after about an hour or so,  
17 and we saw somebody walk in the courtroom, and his clothes  
18 are a little damp and a little water on his head and a  
19 little water dripping from his face. Let's assume that a  
20 few moments later someone else comes into that courtroom,  
21 and he's got a hat in his hand, his clothes are damp, the  
22 hat is dripping a little bit of water, and he's got an  
23 umbrella in his hand and the umbrella is dripping a little  
24 bit of water.

25 Now you could assume from those facts that even



1 jkbg

2 though it had been a beautiful sunshiny day when you came  
3 in here, that several hours later the weather had changed  
4 and, in fact, the weather was now raining or it had been  
5 raining outside.

6 You could not see it but that is a chain of  
7 circumstances that lead or point to the existence or non-  
8 existence of certain facts -- nonexistence or existence,  
9 namely, that it was no longer sunshining but now was  
10 raining.

11 The law makes no distinction, as I said before,  
12 between direct and circumstantial evidence, but merely  
13 requires that you find the facts in accordance with all  
14 the evidence in the case, both direct and circumstantial.

15 In this case the defendants have entered a  
16 plea of not guilty to the charges in the indictment, thus  
17 the burden is upon the prosecution to prove guilt beyond  
18 a reasonable doubt. This burden never shifts to a  
19 defendant, for the law never imposes upon a defendant in  
20 a criminal case the burden or duty of calling any witnesses  
21 or producing any evidence.

22 As I told you at the time of your selection  
23 as jurors, and in my instructions at the commencement of  
24 the trial, the law presumes a defendant to be innocent of  
25 crime. Thus a defendant, although accused, begins the



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2 trial with no evidence against him, and the law permits  
3 nothing but legal evidence, presented before you as jurors,  
4 to be considered in support of any charge against a  
5 defendant.

6 The presumption of innocence remains with the  
7 defendant throughout the trial and your deliberations  
8 until such time, if ever, as you are satisfied of guilt  
9 beyond a reasonable doubt.

10 Thus the presumption of innocence alone is  
11 sufficient to acquit a defendant unless and until, after  
12 careful and impartial consideration of all the evidence  
13 in the case, you, as jurors, are unanimously convinced of  
14 a defendant's guilt beyond a reasonable doubt. And that  
15 is a term which I will define for you later on. I will  
16 mention it a number of times during the course of these  
17 instructions, but I will define it with precision later on.

18 Now, the indictment in this case contains nine  
19 counts and originally named seven defendants. You in your  
20 deliberations will be asked to consider only the charges  
21 against the two defendants on trial before you. Both of  
22 them are named in Count 1, which is the conspiracy count,  
23 and the defendant Cruz is named also in Count 3, which we  
24 term a substantive count. I will read both of those  
25 counts to you later on. But each of these counts charges



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2 a separate offense or crime and each must be considered  
3 separately.

4 Now I have indicated that other defendants  
5 were named here, but you are only to consider the guilt or  
6 innocence of the defendants now on trial, and you may have  
7 to determine the nature of the participation, if any, of  
8 the other named defendants or co-conspirators in connection  
9 with my instructions as I give them to you.

10 Now you must bear in mind in the determination  
11 of the question of innocence or guilt, that guilt is  
12 personal. The guilt or innocence of the individual  
13 defendants on trial before you must be determined separately  
14 with respect to him or her solely on the evidence or lack  
15 of evidence presented against him or her. The case of  
16 each defendant stands or falls upon the proof or lack of  
17 proof of the charge against that defendant and not against  
18 somebody else.

19 This has been a short trial, and there is no  
20 need for me to go over the evidence or comment on it.

21 However, it might be helpful for me to list  
22 for you or set out for you the names of the witnesses as  
23 they appeared in this case. The first witness was Jose  
24 Guzman, a New York City police officer, assigned to the  
25 Drug Enforcement Task Force. He was followed by Julio



2 Mercado, who had a similar position. He was followed by  
3 Ronald Stanley, a similar position. Mr. Joseph Scamardella  
4 was also called on the Government's direct case, and  
5 following that there were two stipulations which were read  
6 to you, which are in evidence, that if a chemist were  
7 called, that he would testify with respect to certain tests  
8 and analyses he made and what he had done with certain  
9 exhibits which were presented to him.

10 Following that the Government rested. The  
11 defense then called Det. Scamardella, and then the  
12 defendant Nereida Hernandez took the stand, and following  
13 that all sides rested. That was the conclusion of the  
14 testimony in this case.

15 Now with this background in mind, I turn to  
16 Count 1 of the indictment which is the conspiracy count.  
17 This count charges the defendants on trial, as well as the  
18 other named defendants in the indictment, with violating  
19 Title 21, United States Code, Section 846, and you don't  
20 have to remember the section number or the code number,  
21 but it provides, insofar as we are concerned, as follows:  
22 Any person who conspires to commit any offense against the  
23 Federal narcotics laws is guilty of a crime.

24 The Federal narcotics laws involved here are  
25 Sections 812, 841(a)(1) and 841 (b)(1)(a) of Title 21.



Again you don't have to remember the section number. But these laws make it unlawful for any person knowingly or intentionally to distribute or possess with intent to distribute heroin and cocaine.

Now the conspiracy count is divided into two sections. I will read the first section of the count to you now, and the second section, which refers to overt acts, I will read that separately later on, but they're not two separate crimes, they're all involved in one, but for purposes of setting it forth to you, it's easier to break it down this way I believe.

Now the first section of the conspiracy count reads as follows: The Grand Jury charges: From on or about the 1st day of April 1977, and continuously thereafter, up to and including the date of the filing of the indictment, (which I believe is June 20th of 1977), in the Southern District of New York, (which I will define for you), Carlos Dellafuente, Rafael Pagan, Edemiro Torres, Nereida Hernandez, Juan Cruz, Radimus DeJesus and Carlos Rodriguez, the defendants, and others to the Grand Jury unknown, unlawfully, intentionally, and knowingly combined, conspired, confederated, and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(a) of Title 21, United States Code.



2. It was part of the said conspiracy that the said defendants unlawfully, intentionally, and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug-controlled substances, to wit, heroin and cocaine, in violation of Sections 812, 841(a)(1) and 841(b)(1)(a), of Title 21, United States Code.

Before you may find a person guilty of conspiracy as charged in Count 1 of the indictment, you must find the following three elements beyond a reasonable doubt, which I indicated to you I will describe later, the definition of that term:

First: That sometime approximately between April 1, 1977 and June 20, 1977, the dates specified in the indictment, an agreement or understanding existed between any two or more named conspirators to commit at least one of the crimes charged in the indictment, namely, the illegal possession with intent to distribute and the distribution of narcotic drug-controlled substances.

In short, the Government must prove beyond a reasonable doubt that a conspiracy existed with respect to the possession and distribution of narcotics. That is the first element.

The second element is that the particular



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2 defendant that you are considering on trial, Nereida  
3 Hernandez, Juan Cruz, knowingly and willfully became a  
4 participant in the conspiracy with knowledge of at least  
5 one of its criminal purposes.

6 And the third element is that one of the con-  
7 spirators knowingly committed at least one overt act set  
8 forth in the indictment at or about the time alleged in  
9 furtherance of the conspiracy, and that at least one of  
10 these acts was committed in the Southern District of New  
11 York, and for our purposes, the Southern District of New  
12 York includes Manhattan and Bronx Counties. It extends  
13 further on up just south of Albany, but for our purposes  
14 that's all that's involved here, Manhattan and the Bronx.

15 Now with respect to the first element, namely,  
16 the existence of a conspiracy, simply defined, a conspiracy  
17 is a combination of two or more persons by concerted  
18 action to accomplish some unlawful purpose.

19 A conspiracy is an unlawful combination or  
20 agreement to violate the law. Whether or not the persons  
21 charged in the indictment accomplished what it's alleged  
22 they conspired to do is immaterial to the question of  
23 guilt or innocence with respect to the conspiracy count.

24 Thus the success or lack of success of the  
25 conspiracy does not matter, for a conspiracy is a crime



2 entirely separate and distinct from the substantive crime  
3 that may be the goal of the conspiracy.

4 A conspiracy has sometimes been called a  
5 partnership in criminal purposes, in which each member  
6 becomes the agent of every other member.

7 However, to establish the existence of the  
8 conspiracy, the Government is not required to show that  
9 two or more persons sat around a table and entered into  
10 a solemn compact orally or in writing stating that they  
11 have formed a conspiracy to violate the law, setting forth  
12 the details of the plan, the means by which it's to be  
13 carried out or the part to be played by each conspirator.

14 Your common sense will tell you that when  
15 people undertake to enter into a conspiracy, much is left  
16 to unexpressed understanding.

17 Conspirators do not usually reduce their agree-  
18 ments to writing or acknowledge them before a notary public,  
19 nor do they publicly broadcast their plans.

20 A conspiracy is almost always characterized  
21 by secrecy.

22 In determining the existence or nonexistence  
23 of a conspiracy, it's not required that you find that each  
24 and every one of the alleged co-conspirators joined in  
25 the conspiracy. It's sufficient if you find beyond a



reasonable doubt that two or more persons in any manner, through any contrivance, impliedly or tacitly came to a common understanding to violate the law.

In determining whether there has been an unlawful agreement, you may consider acts and conduct which are done to carry out a criminal purpose. Usually the only evidence available is that of disconnected acts on the part of the alleged individual conspirators, which acts you may find, when taken together in connection with each other, and with reasonable inferences flowing therefrom show a conspiracy or agreement to secure a particular result as satisfactorily and conclusively as more direct proof.

If upon consideration of all the evidence, direct and circumstantial, you find beyond a reasonable doubt that the minds of at least two of the alleged conspirators met in an understanding way, and that they have agreed, as I have explained a conspiratorial agreement to you, to work together in furtherance of the unlawful scheme alleged in the indictment, and that thereafter one of the co-conspirators did any overt act to effect the object of the conspiracy, then proof of the existence of the conspiracy is complete or is established.

In this connection, as I have told you, it's



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not necessary for the Government to prove the success of  
3 the conspiracy in order to establish a violation of the  
4 conspiracy statute. That is Count 1. As a conspiracy is  
5 basically the agreement to violate the law, it may exist  
6 even though the final objectives were never accomplished.

7

Now some comments may be helpful to you with  
8 respect to this.

9

You know that I have defined a conspiracy as  
10 a combination of two or more persons by concerted action  
11 to accomplish some unlawful purpose. Thus, before you may  
12 find that a conspiracy existed, you must also find that  
13 what the conspirators intended to do would have violated  
14 one or more Federal laws if they had succeeded in  
15 accomplishing what they set out to do.

16

Now with respect to the existence of the con-  
17 spiracy, the indictment alleges that it commenced on or  
18 about April 1, '77 and continued up until June 20 of 1977.

19

It's not necessary for the Government to prove  
20 that the conspiracy started and ended on those specific  
21 dates. It is sufficient if you find that in fact a con-  
22 spiracy was formed and that it existed for some substantial  
23 time within the period set forth in the indictment and  
24 that at least one overt act was committed during that  
25 period.



A conspiracy, once formed, continues for as long as the evidence shows the conspirators intended to continue it. Such intention may be inferred from such activities, if any, of the conspirators which you find to be in furtherance of the purpose of the conspiracy.

Now the second element, participation in the conspiracy.

If you find beyond a reasonable doubt that the conspiracy charged in the indictment existed, you must determine who its members were, and whether the defendant on trial that you are considering participated in the conspiracy with knowledge of its unlawful purposes and in furtherance of its unlawful objectives.

In determining whether a person became a member of the conspiracy, you must determine not only whether he participated in it, but whether he did so with knowledge of its unlawful purpose. Did that person join with an awareness of at least some of the aims and purposes of the conspiracy?

Knowledge is a matter of inference from facts proved. It's not necessary that a defendant be fully informed as to the details or the scope of the conspiracy in order to justify an inference of knowledge. A defendant need not know the full extent of the conspiracy and all of



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its activities and actors. However, mere association with one or more of the conspirators does not make one a member of the conspiracy nor is knowledge without participation sufficient.

What is necessary is that the defendant participate with knowledge of at least some of the purposes of the conspiracy and with the intent to aid in the accomplishment of those unlawful ends.

Now, extent of participation. If you find that the conspiracy charged existed and that a particular defendant knowingly participated in it, the extent of his participation or extent -- I use his; it's his or her; maybe we should use person again, which is a difficult thing -- but the extent of that person's participation has no bearing on the question of guilt or innocence.

The guilt or innocence of a conspirator is not measured by the extent or the duration of that person's participation. Even if that person participated in it to a degree more limited than that of that person's co-conspirators, that person is equally culpable so long as that person was in fact a conspirator.

If one joined the conspiracy after its formation and engaged in it to a more limited degree than other co-conspirators, that person is equally culpable, so long as



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you find beyond a reasonable doubt that that person was in fact a co-conspirator.

Thus, each member of a conspiracy may perform separate and distinct acts at different times and at different places. Some conspirators may play major roles while others may play minor roles. In other words, it does not require that a person be a member of the conspiracy from its very start. That person may join it at any point during its progress and be held responsible for all that has been done before that person joined and all that may be done thereafter, during its existence, and while that person remains a member. Simply stated, using the partnership analogy, by becoming a partner, that person assumes all the liabilities of the partnership, including those that occurred before that person became a member.

And similarly, each conspirator need not know the identity or the number of all his confederates. The conspirators may not have previously associated together. One of the persons or conspirators may know only one other member of the conspiracy, but if that person enters into an unlawful agreement with any other member of the conspiracy, that person becomes a party thereto.

Nor is it necessary that a conspirator receive any pecuniary benefit from that person's participation in



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2 the conspiracy as long as that person in fact participated  
3 in it in the way I have instructed you.

4 The question is, did a defendant join the  
5 others with the awareness of at least some of the basic  
6 purposes and aims of the conspiracy? If so, that person  
7 then adopts as his own the past and future acts of all the  
8 other conspirators.

9 Now, I read part of this to you before, at the  
10 early part of the trial, when some testimony came in, and  
11 I will reread it to you: In determining whether a con-  
12 spiracy existed, you should consider the acts and declara-  
13 tions of all the alleged participants. However, in  
14 determining whether a particular defendant was a member of  
15 a conspiracy, you may consider only that defendant's acts  
16 and statements. That defendant cannot be bound by the  
17 acts or declarations of other alleged participants until  
18 you are satisfied beyond a reasonable doubt that a con-  
19 spiracy existed and that the defendant you are then con-  
20 sidering was one of its members.

21 In other words, your determination as to the  
22 participation in the conspiracy of each defendant must be  
23 based upon what you find to have been that person's own  
24 actions, own conduct, own statements or declarations, that  
25 person's connection with the acts and conduct of other



1  
2 alleged co-conspirators, and the reasonable inferences to  
3 be drawn therefrom.

4           You will recall that at the beginning we took  
5 evidence subject to connection. Thus, testimony concerning  
6 acts or statements of one alleged co-conspirator done or  
7 said in the absence of other alleged co-conspirators,  
8 although received in evidence without limitation against  
9 the alleged co-conspirator who did the act, who made the  
10 statement or admission, was admitted into evidence as to  
11 the absent alleged co-conspirator on a conditional or  
12 tentative basis.

13           If you find beyond a reasonable doubt that a  
14 conspiracy existed and if you also find beyond a reasonable  
15 doubt that a particular defendant was one of its members,  
16 then the statements thereafter knowingly made and the acts  
17 thereafter knowingly done by any person likewise found by  
18 you to be a member of the conspiracy can be considered by  
19 the jury as evidence in the case as to any defendant found  
20 to be a member of the conspiracy, even though the state-  
21 ments and acts may have occurred in the absence and without  
22 the knowledge of that defendant, provided such statements  
23 and acts were knowingly made and done during the continuance  
24 of such conspiracy, and in furtherance of some object or  
25 purpose of the conspiracy.



2 Thus, statements of any conspirator which are  
3 not in furtherance of the conspiracy or which are made  
4 before its existence or after its termination may be  
5 considered as evidence only against the person making them.

6 In that connection, I charge you that a con-  
7 spiracy terminates with the arrest of each of the members  
8 of the conspiracy.

9 If you find that a conspiracy exists, its  
10 termination was with the arrest; that is the ending of the  
11 purpose of the conspiracy.

12 Now a final word on this second element. I  
13 told you that a conspiracy once formed is presumed to  
14 continue until either its object is accomplished or there  
15 is some affirmative act of termination by its members. So,  
16 too, once a person is found to be a member of a conspiracy,  
17 that person is presumed to continue its membership therein  
18 until its termination, and the burden is upon that con-  
19 spirator to satisfy you by affirmative proof that that  
20 person withdrew and dissociated its interest from it.

21 Now so much for the first branch of the  
22 conspiracy count.

23 The second branch of it refers to so-called  
24 overt acts.

25 If you find beyond a reasonable doubt that the



2 alleged conspiracy existed and that the particular defendant  
3 was a member of the conspiracy, you must then consider  
4 the third element, namely, an overt act.

5 Now the overt acts referred to in the indict-  
6 ment are not separate charges. I've already told you that  
7 but I do tell you again. They are part of the conspiracy  
8 count, and you may not find a defendant guilty unless and  
9 until you are convinced beyond a reasonable doubt that at  
10 least one of the overt acts charged in the indictment was  
11 knowingly and willfully committed by at least one of the  
12 conspirators, and that at least one act was committed in  
13 the Southern District of New York, which I've already  
14 defined for you.

15 The offense of conspiracy is complete when the  
16 unlawful agreement is made and any overt act is done by  
17 a conspirator to effect the object of the conspiracy. Thus,  
18 an overt act is an act knowingly and willfully committed  
19 by one of the conspirators in an effort to effect or  
20 accomplish some object or purpose of the conspiracy. The  
21 overt act need not be a criminal act or an act which of  
22 itself constitutes an objective of the conspiracy. It may  
23 be an act which is innocent on its face, but it must be of  
24 such character that it furthers or promotes or aids and  
25 assists in accomplishing a purpose of the conspiracy charged



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2 in the indictment. It is not necessary for you to find  
3 that all of the alleged overt acts charged in the indict-  
4 ment were committed nor is it necessary that an overt act  
5 involve a particular defendant. It is enough if you find  
6 that at least one of the named overt acts charged in the  
7 indictment was committed by a conspirator in furtherance  
8 of the conspiracy and at least one in the Southern District  
9 of New York.

10 Now the following overt acts are set forth  
11 in the indictment.

12 In pursuance of the said conspiracy, and to  
13 effect the objects thereof, the following overt acts were  
14 committed in the Southern District of New York:

15 (1). On or about April 7, 1977, the defendants  
16 Carlos Rodriguez, Radimus DeJesus, Juan Cruz, and Edemiro  
17 Torres were together at 640 East 139th Street, Apartment 3-H,  
18 New York, New York.

19 The second alleged overt act: On or about  
20 April 7, 1977, the defendants Carlos Rodriguez and Juan  
21 Cruz assisted Edemiro Torres in counting \$1200.

22 (3). On or about April 7, 1977, the defendant  
23 Carlos Rodriguez gave two tinfolils of cocaine to an  
24 individual.

25 (4). On or about April 14, 1977, defendants



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2 Radimus DeJesus and Edemiro Torres were together at 640  
3 East 139th Street, Apartment 3-H, Bronx, New York.

4 (5). On or about May 24, 1977, the defendants  
5 Edemiro Torres and Nereida Hernandez were together at  
6 640 East 139th Street, Apartment 3-H, Bronx, New York.

7 And the last overt act: On or about June 10,  
8 1977, the defendants Carlos Dellafuente, Rafael Pagan and  
9 Edemiro Torres met in the vicinity of 1246 Westchester  
10 Avenue, Bronx, New York.

11 I know it's not necessary to repeat it, and  
12 you think that I don't give you enough intelligence, but  
13 nonetheless, I do it: The overt acts are not separate  
14 charges, but in order to complete the charge of conspiracy,  
15 you must find beyond a reasonable doubt that at least one  
16 of those acts was done in the Southern District of New  
17 York.

18 Now in defining the elements of a conspiracy,  
19 and later on, in connection with other matters -- but  
20 I've used it, I will use it again --, I've used the words  
21 knowingly and willfully. A person acts knowingly if he  
22 acts voluntarily and intentionally and not because of  
23 mistake or accident or other innocent reason.

24 The purpose of adding the word knowingly was  
25 to insure that no one would be convicted for an act done



2 because of mistake or accident or other innocent reason.

3 A person acts willfully if that person acts  
4 voluntarily and intentionally and with the specific intent  
5 to do something the law forbids; that is to say, with bad  
6 purpose either to disobey or disregard the laws.

7 Now those, then, are the three essential  
8 elements necessary to establish a conspiracy: First, that  
9 the conspiracy existed as charged in the indictment.  
10 Second, that the particular defendant that you are con-  
11 sidering knowingly and willfully joined the conspiracy; and,  
12 third, that one of the conspirators knowingly and willfully  
13 committed at least one of the overt acts set forth in the  
14 indictment.

15 And, of course, as I have indicated, the  
16 Government must establish each of these three elements by  
17 proof beyond a reasonable doubt.

18 Now with respect to the other charge in this  
19 case, I told you that the law makes a conspiracy a separate  
20 and distinct offense from any substantive, as we call it,  
21 offense that may be alleged to be the object of the  
22 conspiracy.

23 The defendant Juan Cruz is named not only in  
24 the conspiracy count but also in Count 3, which is a  
25 substantive count, and that reads -- it charges the



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defendant Cruz with violating Title 21 of the United States Code, Sections 812, 841(a)(1), 841(b)(1)(a), and also Title 18, United States Code, Section 2, a section that I will read to you later which relates to aiding and abetting.

Now the particular Section 841 provides: It shall be unlawful for any person knowingly or intentionally to distribute or to possess with intent to distribute a controlled substance.

Section 2, which is the aiding and abetting section, reads in pertinent part as follows: Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission is punishable as a principal, and whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal.

The indictment charges in Count 3 as follows: On or about the 7th day of April 1977, in the Southern District of New York, Edemiro Torres, Carlos Rodriguez, Juan Cruz and Radimus DeJesus, the defendants, unlawfully, willfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug-controlled substance, to wit, approximately 30.63 grams net weight of heroin.



Now before you may find the defendant Juan Cruz guilty of the crime charged in Count 3 of this indictment, you must be satisfied that the Government has proven each of the following elements beyond a reasonable doubt: First. That on or about the date charged, that is, April 7, 1977, the defendant did distribute or possess with intent to distribute a narcotic drug-controlled substance.

It's sufficient if you find beyond a reasonable doubt that the defendant Cruz either distributed or possessed with intent to distribute the narcotic drug.

The word distribute in the statute means the actual constructive or attempted transfer of the controlled substance. The word possess as used in the statute has an everyday common meaning and that is simply to have something within your control.

A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it. Possession is also defined as having both the power and the intention at a given time to exercise dominion or control over it, either directly or through another person.

Under the law possession may be sole, individual or it may be joint. If one person alone has possession of a thing, possession is sole. If two or more persons share



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2 possession of an object, possession is joint.

3 Now the second element: If you find that the  
4 defendant Cruz did distribute and possess with intent to  
5 distribute the controlled substance, you must next determine  
6 whether or not he did so unlawfully, willfully and knowingly.

7 An act is done willfully if done voluntarily  
8 and intentionally, as I have already told you, with a  
9 specific intent to do something the law forbids.

10 An act is done knowingly if done voluntarily,  
11 intentionally and not because of mistake, accident or  
12 other reason.

13 Now with respect to the offense charged in  
14 this count, the law requires that specific intent be proved  
15 beyond a reasonable doubt.

16 The third element: If you are satisfied that  
17 the first and second elements of the offense charged have  
18 been proved beyond a reasonable doubt, you must then  
19 determine whether or not the substance contained in Govern-  
20 ment's Exhibit 3 was, in fact, a narcotic drug.

21 In this connection, as well as in connection  
22 with other exhibits, in those plastic bags, with the  
23 exception of that one that's been eliminated from one of  
24 them there, I will instruct you as a matter of law that  
25 cocaine and heroin are narcotic drugs listed in Schedule I



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or Schedule II of the Drug Control Act.

Now it has been stipulated with respect not only to Exhibit 3 but with all the other exhibits that if the expert were called to testify -- and that stipulation has been read to you --, he would testify that he tested these substances, and you've heard what the results of his analysis were.

Now the fact that we have stipulated to the testimony, nonetheless you must find beyond a reasonable doubt that these substances are in fact what he has claimed that he said they were, pursuant to his chemical analysis.

Now, I've mentioned the words aiding and abetting with respect to Count 3 of the indictment, the substantive count, against Juan Cruz.

It's not necessary for the Government to show that the defendant Juan Cruz physically committed the offense charged against him. Section 2, as I've read it to you before, provides that a person who aids, abets, counsels, commands, induces or procures the commission of an offense against the United States is as equally punishable as a principal.

This means that not only is the person who actually commits an illegal act, namely the principal, punishable, but anyone who aids, abets him in committing



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that illegal act is likewise punishable. Accordingly you may find the defendant Juan Cruz guilty of the offense charged if you find beyond a reasonable doubt that that offense was committed in Count 3, and that he aided and abetted in its commission.

To aid and abet does not mean just knowing that a crime is being committed, even if one is present during its commission. That alone is insufficient. In order to find that a person aided and abetted another to commit a crime, you must be satisfied beyond a reasonable doubt that he knowingly and in some substantial measure associated himself with the venture, that he participated in it as something he wished to bring about, and that he sought by his action to make it succeed. In other words, if one fully aware of what he is doing plays a significant role in facilitating a transaction prohibited by law, he is equally guilty with the person who directly performs the illegal act, even though the latter played a greater or much larger role in the perpetration of the crime.

The evidence of the defendant's participation may be circumstantial, from which you may conclude that the defendant as an aider and abettor was a participant in the crime charged. A single act may come within the definite prohibition of the aiding and abetting law.



2 Whether one aided and abetted another to commit a crime  
3 must be determined solely upon the alleged aider and  
4 abettor's own conduct, acts and statements.

5 Now, that concludes that part of my charge  
6 which relates to the specific offenses charged in the  
7 indictment, but there are additional things, not too long  
8 duration, that I must instruct you about, and one of them  
9 is reasonable doubt.

10 I told you that in connection with the various  
11 elements of the offenses charged in the indictment, the  
12 Government must establish each of those elements by proof  
13 beyond a reasonable doubt and you naturally ask, what is  
14 a reasonable doubt?

15 The words almost define themselves, that there  
16 is a doubt founded in reason and arising out of the evidence  
17 or lack of evidence. It's a doubt which a reasonable  
18 person has after carefully considering all the evidence.

19 A reasonable doubt is not a vague or speculative  
20 or imaginary doubt. It's not caprice, whim or speculation.  
21 It's not an excuse to avoid the performance of an un-  
22 pleasant duty. It's not sympathy for a defendant.

23 A reasonable doubt is a doubt which appeals  
24 to your reason, your common sense, your experience, and  
25 your judgment.



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2                   It's a doubt which would cause a reasonable  
3 man or woman like yourselves to hesitate to act in relation  
4 to your own important private affairs.

5                   Mere suspicion will not justify conviction.  
6 Suspicion is not a substitute for evidence, nor is it  
7 sufficient to convict if you find that the circumstances  
8 merely render an accused probably guilty.

9                   On the other hand, it's not required that the  
10 Government must prove guilt beyond all possible doubt. But  
11 the proof must be of such convincing character that you  
12 would be willing to rely and act on it in the important  
13 affairs of your own life.

14                  In sum, a reasonable doubt exists whenever,  
15 after a fair and impartial consideration of all the evidence  
16 before you, you can candidly and honestly state that you  
17 do not have an abiding conviction that a defendant is  
18 guilty of a charge.

19                  Now I have used, during the course of my charge,  
20 the words knowledge and intent as an element of a crime.

21                  An act or a failure to act is knowingly done  
22 if done voluntarily and intentionally and not because of  
23 mistake or other innocent reason. Further comment may be  
24 helpful to you.

25                  Knowledge and intent exist in the mind. We



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2 all know that you can't open up somebody's head to find  
3 out what's going on in his mind. Therefore, the only way  
4 you have for arriving at a decision on these questions is  
5 for you to take into consideration all the facts and  
6 circumstances shown by the evidence and to determine from  
7 all such facts and circumstances whether the requisite  
8 knowledge and intent were present at the time in question.

9 Direct proof is not only unnecessary, it's  
10 impossible, but knowledge and intent may be inferred from  
11 all the surrounding circumstances.

12 In the beginning, I told you that one of your  
13 most important functions during the course of this trial  
14 would be to assess the credibility of the witnesses who  
15 testified.

16 You as jurors are the sole and exclusive judges  
17 of the credibility of the witnesses and you and you alone  
18 must determine what weight their testimony deserves.

19 I gave you some guidelines early on. I'm  
20 going to repeat those and expand upon them. You are to  
21 understand, of course, and I'm sure you realize that you  
22 should not be influenced by the mere number of witnesses  
23 called by either side. The weight of the evidence is not  
24 determined by the number of witnesses testifying on either  
25 side. Rather you should consider all the facts and



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2 circumstances in evidence to determine where the truth  
3 lies.

4 In assessing credibility, you should carefully  
5 scrutinize the testimony given, the circumstances under  
6 which each witness has testified, and every matter in  
7 evidence which tends to indicate whether the witness is  
8 worthy of belief.

9 The degree of credit to be given to a witness  
10 should be determined by his demeanor, his relationship to  
11 the controversy and the parties, his bias or impartiality,  
12 the reasonableness of his statements, the strength or  
13 weakness of his recollection viewed in the light of all  
14 other testimony and the attendant circumstances in the  
15 case, and the extent to which, if at all, each witness is  
16 either supported or contradicted by other evidence.

17 How did the witness impress you? Did the  
18 witness' version appear straightforward and candid? Or  
19 did the witness try to hide some of the facts? Is there  
20 a motive to testify falsely?

21 In passing upon the credibility of the witness,  
22 you may take into account inconsistencies or contradictions  
23 as to material matters in that witness' own testimony or  
24 any conflict with that of another witness; also any  
25 inconsistencies or omissions in prior testimony or any



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prior statement of material matters as to which the witness may have testified upon the trial.

Inconsistencies or discrepancy in the testimony of a witness or between the testimony of different witnesses may or may not cause a juror to discredit such testimony.

Two or more persons witnessing an incident or a transaction may see or hear it differently, and innocent misrecollection, like failure of recollection, is not an uncommon experience.

A witness may be inaccurate, contradictory, or untruthful in some respects, and yet be entirely credible in the essentials of that witness' testimony.

In weighing the effect of a discrepancy, consider whether it pertains to a matter of important or unimportant detail and whether the discrepancy results from innocent error or willful falsehood.

If you find that any witness has testified falsely, you can do one of two things: You can either reject all of that witness' testimony on the grounds that it is all tainted by falsehood and that none of it is worthy of belief, or you can accept that part which you believe to be credible and reject only that part which you believe to be tainted by falsehood.

Now, should you find that all or any part of



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the particular witness' testimony was false, you may not, of course, infer that the opposite of that testimony is the truth unless there is other evidence to that effect.

Any testimony rejected by you as false is no longer in the case insofar as any finding that you may make is concerned.

You will recall that I told you that an inference is a conclusion which reason or common sense lead you to draw from the facts which you find have been proved.

Thus a finding of fact may not be established merely by a negative inference arising from your disbelief and rejection of any testimony.

In passing upon credibility, the ultimate question for you to decide is, did the witness tell the truth here before you?

It's for you to say whether the witness' testimony at this trial is truthful in whole or in part in light of the witness' demeanor, explanations, and all the evidence in the case.

Now I told you at the outset that the law does not require a defendant in a criminal case to testify or present any evidence. Also you must realize that a defendant is not required under our laws to prove his



innocence. A person is presumed innocent at all times and throughout the entire trial unless and until the Government proves that person guilty beyond a reasonable doubt.

Now, for that reason, a defendant need not take the witness stand and testify. The fact that the defendant Cruz did not testify in this trial does not create any presumption for or against him, and I charge you that this fact must not weigh in the slightest against or for him, nor shall this fact enter into your discussions or deliberations in any manner.

Now, the fact, also, that the defendant Hernandez took the stand here should not in any way affect your determination with respect to the defendant Cruz. But with respect to defendant Hernandez, whereas here she testified, it is your function as jurors to assess her credibility in the same manner as you assess the credibility of any other witness.

You will recall that I instructed you that one of the factors that you could consider in this respect in judging credibility was any interest a witness may have in the outcome of the trial.

Obviously every defendant has a personal interest in the outcome of the case.

In appraising her credibility, you may take



the fact of interest into consideration. However, it by no means follows that simply because a person has a substantial interest in the result that that person is not capable of telling a straightforward or truthful story.

It's for you to decide to what extent, if at all, that defendant's interest has affected her testimony.

Now, there is no presumptions against the Government for its failure to call a witness if it should appear to you that that witness' testimony would be merely cumulative or repetitious and have no greater value than that of witnesses who have in fact testified.

If a potential witness could have been called by the Government or by the defendants and neither side calls a witness, then you may infer that the testimony of the absent witness might have been unfavorable either to the Government or to the defendants or both of them. On the other hand, it's equally within your province to draw no inference at all from the failure of either side to call a witness.

I remind you again, as I've told you, that there is no burden upon the defendants in their case to call any witnesses or to produce any proof.

Now we have had some what might be called statements or admissions in connection with the defendant



Hernandez here.

Evidence relating to any statement or admission claimed to have been made by a defendant outside of court and after a crime has been committed should be considered with caution and weighed with care, and all such evidence should be disregarded entirely unless the evidence in the case convinces you beyond a reasonable doubt that the statement or admission was knowingly made.

I've told you before that knowingly means if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

In determining whether any statement or admission claimed to have been made by a defendant outside of court and after a crime has been committed was knowingly made, you should consider the age, training, education, occupation and physical and mental condition of that person and that person's treatment while in custody or under interrogation as shown by the evidence in the case and whether or not such statements or admissions were induced by any coercion or duress, and also all other circumstances and evidence surrounding the making of the statement, including but not limited to whether before the statement was made the defendant knew or had been told and understood that that person was not obligated or



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required to make a statement claimed to have been made by her, that any statement which she might make could be used against her in a court of law, that she was entitled to the assistance of counsel before making any statement, whether written or oral, and that if she was without money or means to retain counsel of her own choice, an attorney would be appointed to advise and represent her free of cost or obligation.

If the evidence in the case does not convince you beyond a reasonable doubt that these statements or admissions were voluntarily and intentionally made, you should disregard them entirely.

On the other hand, if the evidence in the case does show beyond a reasonable doubt that the statements or admissions were in fact voluntarily and intentionally made by the defendant, you may consider it as evidence in the case against the defendant who voluntarily and intentionally made the statements and admissions.

Now, you should not draw any inference favorably or unfavorably towards the Government or the defendants on trial here from the fact that the other persons named in the indictment are not on trial.

You should not consider it in any way. Those are matters which are wholly outside your concern and have



2 no bearing on your function as jurors.

3 It will be just a moment or two more.

4 In your deliberations, please do not consider  
5 or discuss the question of possible punishment. That is  
6 a matter that rests on my conscience and my conscience  
7 alone because the judge and the judge alone is the one who  
8 has the obligation and the duty of imposing sentence when  
9 and if guilt is established.

10 If you discuss it among yourselves or let it  
11 enter into your deliberations, then you are encroaching  
12 upon my function, and I ask you not to do it.

13 Your function is to consider the facts and to  
14 determine the facts, and my function is to pass upon the  
15 law and in the event of conviction, to impose sentence.

16 If you find on all the evidence that the  
17 evidence respecting a defendant leaves a reasonable doubt  
18 as to that defendant's guilt, you should not hesitate for  
19 a moment to return a verdict of not guilty as to that  
20 defendant.

21 However, on the other hand, if you find beyond  
22 a reasonable doubt that the law has been violated as  
23 charged, you should not hesitate because of sympathy or  
24 because of any other reason to render a verdict of guilty.

25 The verdict must represent the considered



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2 judgment of each juror. Your verdict must be unanimous.  
3 It is your duty as jurors -- let me explain that to you.  
4 Your verdict must be unanimous. There are, as I've said,  
5 three charges in here; it must be unanimous on each count.

6 It's your duty as jurors to consult with one  
7 another and to deliberate with a view to reaching an  
8 agreement, if you can do so without violence to individual  
9 judgment.

10 Each of you must decide the case for yourself.  
11 But do so only after an impartial consideration of the  
12 evidence with your fellow jurors.

13 In the course of your deliberations, do not  
14 hesitate to re-examine your own views and change your  
15 opinion if you are convinced that it's erroneous.

16 Do not surrender your honest convictions as  
17 to the weight or effect of evidence solely because of the  
18 opinion of your fellow jurors or for the mere purpose of  
19 returning a verdict.

20 You are not partisans. You are judges, judges  
21 of the facts. Your sole interest is to ascertain the  
22 truth from all of the evidence in this case.

23 If it becomes necessary during your delibera-  
24 tions to communicate with the Court, you may send a note  
25 through the marshal, signed by your foreman, or by one or



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more of the jurors. No member of the jury should ever attempt to communicate with the Court by any means other than by a signed writing, and the Court will never communicate with any member of the jury on any subject touching on the merits of the case, otherwise than in writing or here orally in open court.

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You will note from the oath to be taken by the marshal or marshals, that they, as well as all other persons are forbidden to communicate in any way or manner with any member of the jury on any subjects touching on the merits of the case.

I want you also to bear in mind that you are never to reveal to any person, not even the Court, how you stand numerically or otherwise on the question of guilt or innocence unless and until after you have reached a unanimous verdict.

Now, I should add that nothing in any of these instructions is to suggest or to convey in any way or any manner any intimation as to what verdict I think you should find.

What the verdict shall be is your sole and exclusive duty and responsibility.

If during the course of your deliberations you require any of the exhibits -- it's not customary to send



1 in exhibits that are narcotics to the jury room, not for  
2 any reason, but it's just not customary to do that, but if  
3 you need any of the other exhibits, or if you need any  
4 of the testimony reread to you, send a note, and if you  
5 want the exhibits, we will send them into you. If you  
6 want any testimony reread, it would be appreciated and  
7 very helpful to us if you could be as precise as you can  
8 as to just exactly what it is that you want.

9  
10 If you can define it very precisely, the court  
11 reporter has to go over his notes, we do not have a  
12 transcript of this testimony, and we have to search back  
13 in through the notes to find it. So if it comes to that,  
14 where you need that testimony, if you can pinpoint it for  
15 us, why it will make our task a lot easier and we can give  
16 you the information more promptly than just a general  
17 question.

18 It's customary -- well, let me suggest this,  
19 before I get to this: Counsel have the right to take  
20 exceptions to any of the charges that I have made and also  
21 to suggest to me other matters that they may want charged  
22 and that I may have forgotten.

23 It's required that be done in the absence of  
24 the jury. It will only take a few moments but I think  
25 it's probably better if you retire to the jury room and



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2 when you return, why, either I will give you further  
3 instructions or tell you to start deliberating.

4 So if you will just step out with Mr. Matarese  
5 and go to the jury room. Don't talk about the case yet.  
6 You haven't gotten it.



14 THE COURT: I have your note. While a  
15 number of your notes have been phrased in language that  
16 might have called for a yes or no answer, without a  
17 dialogue, it's impossible to give that to you. I'm not  
18 avoiding it, but it's my obligation, I believe, to instruct  
19 you in the ways that I think may cover what's required by  
20 a full response to your note, and in that respect, in  
21 connection with this most recent note, I will recharge  
22 again the necessary elements of the conspiracy, other than  
23 the overt acts, which don't have to be -- I don't think it  
24 calls for that. You know that the overt acts are part of  
25 it, that a person doesn't have to participate in an overt



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act, but one of the overt acts must be done in the Southern District of New York, and it must be proved beyond a reasonable doubt that they occurred during the course of the conspiracy.

6

A JUROR: Can't hear you.

7

THE COURT: All right. I'm not going to charge you again about the overt act situation which you know that an overt act is not a separate, but a component of the conspiracy count.

11

Now before you may find the defendant guilty of conspiracy as charged in Count 1 of the indictment, you must find the following three elements beyond a reasonable doubt: First, that sometime approximately between April 1, '77 and June 20, '77, an agreement or understanding existed between any two or more named conspirators to commit at least one of the crimes charged in the indictment, namely, the illegal possession with intent to distribute and the distribution of narcotic drug-controlled substances. In short, that the Government proved that a conspiracy existed with respect to the possession and distribution of narcotics. That's the first element.

23

The second element is that the defendant you are considering, namely Nereida Hernandez, knowingly and willfully became a participant in the conspiracy with

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knowledge of at least one of its criminal purposes;

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And the third element is the overt acts about which I am not going to charge you.

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Now first with respect to each of these elements, the existence of the conspiracy: Simply defined, a conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose. A conspiracy is an unlawful combination or agreement to violate the law. Whether or not the persons charged in the indictment accomplished what it's alleged they conspired to do is immaterial to the question of guilt or innocence. Thus the success or lack of success of the conspiracy does not matter, for a conspiracy is a crime entirely separate and distinct from the substantive crime that may be the goal of the conspiracy.

A conspiracy has sometimes been called a partnership in criminal purposes in which each member becomes the agent of every other member. However, to establish the existence of a conspiracy, the Government is not required to show that two or more persons sat around a table, entered into a solemn compact, orally or in writing, stating that they have formed a conspiracy to violate the law, setting forth the details of the plan, the means by which it's to be carried out, or the part to be played by



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2 each conspirator.

3 Your common sense will tell you that when men  
4 undertake to enter into a conspiracy, much is left to un-  
5 expressed understanding. Conspirators do not usually  
6 reduce their agreements to writing, or acknowledge them  
7 before a notary public, nor do they publicly broadcast  
8 their plans. A conspiracy is almost always characterized  
9 by secrecy.

10 In determining the existence or nonexistence  
11 of a conspiracy, it's not required that you find that each  
12 and every one of the alleged co-conspirators joined in  
13 the conspiracy. It's sufficient if you find beyond a  
14 reasonable doubt that two or more persons in any manner,  
15 through any contrivance, impliedly or tacitly came to a  
16 common understanding to violate the law.

17 In determining whether there has been an un-  
18 lawful agreement, you may consider acts and conduct which  
19 are done to carry out a criminal purpose. Usually the  
20 only evidence available is that of disconnected acts on the  
21 part of the alleged individual conspirators, which acts  
22 you may find, when taken together in connection with each  
23 other, and with the reasonable inferences flowing therefrom,  
24 show a conspiracy or agreement to secure a particular  
25 result, as satisfactorily and conclusively as more direct



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2 proof.

3 If upon consideration of all the evidence,  
4 direct and circumstantial, you find beyond a reasonable  
5 doubt that the [redacted] of at least two of the alleged con-  
6 spirators met in an understanding way, and that they agreed,  
7 as I have explained a conspiratorial agreement to you, to  
8 work together in furtherance of the unlawful scheme alleged  
9 in the indictment, and that thereafter at least one of the  
10 co-conspirators did any overt act to effect the object of  
11 the conspiracy, then proof of the existence of the con-  
12 spiracy is established.

13 In this connection, as I have told you, it's  
14 not necessary for the Government to prove the success of  
15 the conspiracy in order to establish a violation of the  
16 conspiracy statute. As a conspiracy is basically the  
17 agreement to violate the law, it may exist even though the  
18 final objectives were never accomplished.

19 Now before you may find that a conspiracy  
20 existed, you must also find that what the conspirators  
21 intended to do would have violated one or more Federal laws  
22 if they had succeeded in accomplishing what they set out  
23 to do.

24 Now, if you find beyond a reasonable doubt  
25 the conspiracy charged in the indictment, you must determine



2 who its members were, and whether the defendant Hernandez  
3 participated in the conspiracy with knowledge of its un-  
4 lawful purposes and in furtherance of its unlawful objectives.

5 In determining whether a defendant became a  
6 member of the conspiracy, you must determine not only  
7 whether that person participated in it, but whether that  
8 person did so with knowledge of its unlawful purpose. Did  
9 that person join with an awareness of at least some of the  
10 aims and purposes of the conspiracy? Knowledge is a matter  
11 of inference from facts proved.

12 It's not necessary that a person or a defendant  
13 be fully informed as to the details or the scope of the  
14 conspiracy in order to justify an inference of knowledge.  
15 A defendant need not know the full extent of the conspiracy  
16 and all of its activities and actors.

17 However, mere association with one or more of  
18 the conspirators does not make one a member of the con-  
19 spiracy, nor is knowledge without participation sufficient.  
20 What is necessary is that the defendant participate with  
21 knowledge of at least some of the purposes of the conspiracy  
22 and with the intent to aid in the accomplishment of those  
23 unlawful ends.

24 If you find that the conspiracy existed, and  
25 that the defendant knowingly participated in it, the extent



of that defendant's participation has no bearing on the question of guilt or innocence. The guilt or innocence of a conspirator is not measured by the extent or the duration of his participation. Even if the person participated in it to a degree more limited than that of the co-conspirators, that person is equally culpable so long as that person was in fact a conspirator.

If one joined the conspiracy after its formation and engaged in it to a more limited degree than other co-conspirators, that person is equally culpable, so long as you find beyond a reasonable doubt that that person was in fact a co-conspirator.

Thus, each member of a conspiracy may perform separate and distinct acts at different times and at different places. Some conspirators may play major roles, while others may play minor roles. In other words, it does not require that a person be a member of the conspiracy from its very start. A person may join it at any point during its progress, and be held responsible for all that has been done before that person joined, and all that may be done thereafter, during its existence, and while that person remains a member.

Simply stated, using the partnership analogy, by becoming a partner, a conspirator assumes all the



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2 liabilities of the partnership's, including those that  
3 occurred before that person became a member. And, similarly,  
4 each conspirator need not know the identity or the number  
5 of all of the alleged confederates. The conspirators may  
6 not have previously associated together. One of the  
7 defendants may know only one other member of the conspiracy.  
8 But if that defendant enters into an unlawful agreement  
9 with another member of the conspiracy, that defendant  
10 becomes a party thereto. Nor is it necessary that a  
11 defendant receive any pecuniary benefit from its participa-  
12 tion in the conspiracy as long as the defendant, in fact,  
13 participated in it in the way I have instructed.

14 The question is, did the defendant join the  
15 others with the awareness of at least some of the basic  
16 purposes and aims of the conspiracy. If so, then that  
17 defendant adopts as that persons own the past and future  
18 acts of all the other conspirators.

19 I believe that responds to your question.

20 Does that respond fully?

21 (Jury nodded affirmatively.)

22 THE COURT: Anybody feel otherwise?

23 (No response.)

24 THE COURT: All right, you may retire.



CERTIFICATE OF SERVICE

February 21, 1978

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Steven Lloyd Bence